a patient there, so that his absence from the ward on the night of the robbery could not have been vouched for by mistake or lapse of memory. It was a circumstance weighing very heavily against him. He was in hospital, between May 22 and June 2, 1967, for a deep cut on his left wrist. The robbery occurred on May 30. One Chellaperumal, a fellow-labourer on the estate, who was also a patient in the same ward during the relevant period, was positive that Adaikan left the ward every night at about 6 p.m. and returned at 6 the following morning. On the other hand, another patient, Nallandran, who was admitted into this ward on May 29, testified that Adaikan did not leave the ward on the night of the robbery or any other night, but was reluctant, nevertheless, to brand Chellaperumal as a liar. The particular night was remembered because he and Adaikan played a certain card game which was a new game to him and which he had never played before or since. Why the game of cards, assuming it to be true, was associated with the night of the robbery, was never explained. It is not surprising, therefore, that the learned trial judge, having to choose whom to believe, preferred Chellaperumal. He had the advantage of seeing and hearing both witnesses consequently we must defer to him in assessing their relative credibility. The learned judge was furthermore satisfied with the identification of this appellant by the estate manager. The arguments addressed to us have in no way affected the measure of our satisfaction that this appellant was rightly convicted. We therefore dismiss his appeal and affirm the sentence passed on all the appellants.

Appeal dismissed.

Solicitors: *Dato' Balwant Singh & Co.; M. Segaram & Co.; R. Ponnudurai.*

SKYLINE TRADING CO. v. TIOW YOKE LAN

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian and Ali F.JJ.) June 20, 1967]

[Kuala Lumpur—Federal Court Civil Appeal No. X.3 of 1969]

Contract — Inchoate contract — Payment of booking fee for purchase of flat — Sale subject to contract — Contract not accepted — Claim for return of booking fee.

The respondent had paid a booking fee of $2,000 for a flat on the understanding that she should sign a contract of purchase within two weeks of receipt of notice from the vendors. Subsequently upon informing herself of the terms of the proposed agreement and form of lease she told the solicitors for the vendors that she was not prepared to buy the flat on the terms of the proposed agreement, which offered a lease instead of a sale of the flat, and she asked for the return of the booking fee. As there was no response she commenced action in the sessions court but her claim was dismissed. The respondent appealed successfully to the High Court which ordered the return of the sum of $2,000. The appellants, the vendors, thereupon appealed to the Federal Court.

Held, dismissing the appeal: (1) the contract of purchase in this case was inchoate of the type where a purchaser of land agreed to purchase subject to a proper contract to be prepared by the vendor's solicitor;

(2) the booking fee in this case was paid on the condition that the amount was to form part of the purchase price in the event that a contract of purchase came to be executed, and as in this case no such contract was entered into the respondent was entitled to refund of the booking fee.

Cases referred to:—

(1) *Howe* v. *Smith* (1884), 29 Ch.D. 89.

(2) *Harrison* v. *Holland* [1921] 3 K.B. 297, on appeal [1922] 1 K.B. 211 .

(3) *Mayson* v. *Clouet & Anor.* [1924] A.C. 980.

(4) *Chillingworth* v. *Esche* [1924] 1 Ch. 97, 104.

(5) *Hatzfeldt-Wildenburg* v. *Alexander* [1912] 1 Ch. 284, 289.

(6) *Coope* v. *Ridout* [1921] 1 Ch. 291.

(7) *Scammell* v. *Ouson* [1941] A.C. 251.

In the High Court, where the respondent was the appellant, *Peter Yeoh* appeared for her and *Eugene Lye* appeared for the company. The following judgment was delivered by the trial judge on December 7, 1968:

Syed Othman J.: On or about 7th October, 1964, the appellant paid the respondents the sum of $2,000 by way of booking fee for a flat on the second floor of a building on the understanding that she should sign a "contract of purchase" within two weeks from the date of notice of notification from the respondents.

On 1st March, 1965 the solicitors for the the respondents informed the appellant that the necessary documents were ready for her perusal and that she should make her first payment of $500 upon signing the agreement.

Upon reading the draft agreement the appellant on 9th day of April 1965 informed the solicitors that she was rejecting the terms of the lease, as according to her it was not in fact a sale as proposed by the respondents and asked for refund to her of the $2,000 booking fee. The respondents refused to refund it maintaining that the appellant's rejection of terms of lease, not sale, was unlawful, denied that there was lack of agreement and contended that the appellant was not entitled to the refund of the booking fee.

In an action by the appellant against the respondent claiming refund of the $2,000 before the sessions court, the learned president dismissed her action with costs. This appeal is against the dismissal.

During the trial the appellant in her evidence said that she had thought that she could get an old lease, by which she meant a 90 year old lease for the flat, but as she was getting a 30 year old lease, on the advice of her son she refused it. The respondents' case was that the appellant had come many times to see them before she eventually made up her mind and paid the $2,000 booking fee, and that because of the law prevailing at the time, namely the F.M.S. Land Code, section 47, they were not in a position to give anything to the appellant more than a 30 year old lease renewable on expiry at the option of the appellant. The law has now changed. Under the National Land Code, 1965, which came into effect on 1st January, 1966, a subsidiary title can be issued in respect of a flat.

It is clear that what the appellant was seeking, i.e., a 90 year old lease, could not have been possibly carried out by the respondents. The appellant should have known this as a matter of law.

The application of the appellant for the flat was made on a printed reservation form, which had been apparently supplied by the respondents. It was printed in Chinese and English. The English part reads as follows:—

"SKYLINE TRADING CO.,
160-2, 3½ mile, Klang Road,
Kuala Lumpur.

SKYLINE GARDENS
4½ Mile, Klang Road, Kuala Lumpur.
(1st Phase Development)

Reservation Form

Date: 7 October, 1964.

Please reserve Flat B Type in Lot No. 4 — Block A (front) 2nd Floor as shown in your 1st Development Plan for my/our purchase.

Enclosed $2,000 (Dollars Two Thousand Only) being payment for Booking Fee (to form part of the purchase price).

Please acknowledge Receipt.

Please Note:

All applicant/s for reservation/s must call at our appointed lawyer's office to sign a Contract of Purchase within 2 weeks from date of our Notice of Notification, failing which our Company reserves the right to cancel and to resell the reserved unit to any other person/s as our Company wishes.

The applicant/s will be responsible for any losses incurred through such sales or transfer due to his own negligence.

Applicant:

Signed: (in Chinese)

Name: Tiow Yoke Lan
(In Block Letters)
1733362

Add: No. 4, ROAD 48A,
PETALING JAYA

Tel:....."

The intention of the conditions under "Please Note" is clear and it is that if the appellant fails to sign a contract of purchase within two weeks from the date of a notice, (i) the respondents are entitled to resell the reserved flat, and (ii) the appellant shall be responsible for any losses incurred through sales or transfer due to her default. (I think what is intended by the word "negligence" in the form is "default" in view of what it qualifies).

It is the contention of the respondents that the conditions give them the right to forfeit the booking fee.

The question to be determined, therefore, is whether payment of money under these circumstances is forfeitable.

In *Howe* v. *Smith*,[1] a sum of money was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date and it was not so completed and the vendors sold to someone else. The purchaser sued for specific performance, which was refused, as he himself had been in default, and then, being allowed to amend his pleadings, he sued for return of deposit. It was held that the deposit being in the nature of a guarantee that the contract should be performed was forfeited and could not be returned. However, Bowen L.J. said:—

"The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract."

In *Harrison* v. *Holland*,[2] a contract for sale of real property provided for a deposit of £50,000 and a further sum of £100,000 as part payment of the price to be paid within a fortnight. The contract also provided that in the event of non-completion the £50,000 should be forfeited and the £100,000 should not. It was held that the parties treated the £100,000 simply as a payment on account of the purchase price, and that the vendors were not entitled on the cancellation of the contract to retain the same as security for any loss they might sustain on a resale. Lush J. who tried the case said at page 300:—

"The £100,000 is not called a deposit, it is expressly stated to be in part payment of the purchase money and as it is not money paid as a guarantee for the due performance of the contract. It is therefore not forfeitable."

The Court of Appeal dismissed the appeal. When delivering his judgment Bankes L.J. remarked:—

"If nothing more had been said about it, as the contract came to an end in consequence of the purchaser's own default neither they nor the assignee would have been able to get the money back." (See [1922] 1 K.B. 211 at p. 213).

This *dictum* of Bankes L.J. was disapproved by the Privy Council in *Mayson* v. *Clouet & Anor.*[3] This case was an appeal

from the judgment of the Supreme Court of the Straits Settlements, Settlement of Singapore (as the Republic then was) affirming a judgment of Shaw C.J. The action was brought by the Official Assignee for whom the appellant was substituted against the respondents to recover $50,000 paid to the respondents on account of the purchase price of certain land agreed to be sold to one Sim Choon Kim, deceased, less a sum due to the respondents for interest. The contract for the sale of the land at the agreed price of $250,000 provided that a deposit should be paid immediately, that the two instalments of cash, being 10 per cent, and that the balance of the price should be paid within ten days of the production of a certificate that certain buildings upon the land were completed; if the purchaser failed to comply with the conditions of the contract his deposit might be forfeited and the land resold. The purchaser paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The vendor rescinded the contract. The claim was for the return of the instalments paid.

It was held that the rights of the parties depended upon the contract and that although the purchaser was in default, the instalments were recoverable, since the contract distinguished between the deposit and the instalments and provided for forfeiture of the deposits only.

The reservation form in this case merely states that the $2,000 will form part of the purchase price of the flat. In my judgment it should therefore be treated as an instalment or a payment on account of the purchase price, and not as a deposit or a payment in the nature of a guarantee that the applicant shall complete the purchase. The conditions only give the respondents the right to resell the reserved flat and to recover any losses they may have incurred by the default of the appellant. The respondents cannot go beyond the intention of the very conditions they have invoked on the appellant and treat the payment as forfeitable at their option. It seems to me the respondents' contention that they are entitled to retain the payment really amounts to a claim to keep it as liquidated damages for which under the conditions of the reservation form they are entitled to sue.

The judgment of the sessions court is set aside and judgment is entered as in the appellant's claim in that court.

The appeal is allowed with costs.

The respondent company appealed against the above judgment.

FEDERAL COURT.

Eugene Lye for the appellant.

Heng Cheng Swee for the respondent.

Ong Hock Thye C.J. (Malaya): This appeal was dismissed on the day of hearing. We now give the grounds of our decision. The appellant is a property developer carrying on business under the style of Skyline Trading Company, which I shall call Skyline for short. Seeing a brochure on the proposed construction of some 4-storey flats on the Klang Road the respondent on October 7, 1964 paid Skyline a booking fee of $2,000 for a flat on the understanding that she should sign a contract of purchase within two weeks of receipt of notice by Skyline to do so. The brochure contained no specimen contract form. In fact the contract was not prepared until some time later, about January 1965 by the Skyline solicitors. On March 1, 1965 they informed her that the documents were ready for her perusal and that she should make a first payment of $500 upon execution thereof. Upon informing herself of the terms of the proposed agreement and form of lease, she told the solicitors that, being now offered a lease instead of a sale of the flat, she wanted a refund of her booking fee. Reminders were sent to these solicitors on May 11 and 27, July 12 and 26, August 30 and September 23, 1965. As they met with no response, she commenced action in the sessions court at Kuala Lumpur claiming the sum of $2,000 with interest and costs.

The claim was dismissed by the president of the sessions court on the ground that the respondent was not entitled to a refund merely because she changed her mind. She was held bound by the condition expressed in the reservation form*.

The respondent appealed successfully to the High Court and, strange to say, Skyline further appealed against such decision on the ground that they were entitled to forfeit the booking fee, not only by virtue of the condition expressed on the reservation form, but also under clauses 2, 3 and 4 of the draft contract which was non-existent when the booking fee was paid.

The condition expressed on the reservation form must, of course, be construed *contra proferentem*. Skyline's own solicitors must have prepared or approved the condition. If Skyline relied on it, the right to forfeit the booking fee must be therein expressed or implied. I could find nothing even remotely suggesting such right.

In my judgment the fee was clearly paid on the condition that the amount was to "form

* See the form reproduced at p. 213 *ante*.

part of the purchase price" in the event that a contract of purchase came to be executed in due course. This is plain beyond peradventure. The condition stipulated that the respondent should sign a contract of purchase within two weeks of being required to do so.

The contract of purchase was, therefore, inchoate, of the type where a purchaser of land agrees to purchase subject to a proper contract to be prepared by the vendor's solicitors. As Pollock M.R. said in *Chillingworth* v. *Esche*:—[4]

"I think when you look at the words here used that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors. . . . . and I think that the intention of the parties was that the full conditions should be considered in a further contract, and that until that further contract was executed there should be no binding contract for the purchase of the property. . . . this court having come to the conclusion that the nature of that agreement was inchoate, it follows that if, at a time before execution of the further agreement, negotiations were broken off, the deposit ought to be repaid to the purchasers."

See also *Hatzfeldt-Wildenburg* v. *Alexander* [5] (*per* Parker J.) and *Coope* v. *Ridout*.[6]

The very fact that learned counsel submitted, in argument, that there was "not much help in the reservation form", that he was relying on the conduct of the parties prior thereto, and that, in one of the grounds of appeal, he complained that the appellate judge "failed to direct his mind and give full consideration to paragraphs 2, 3 and 4 of Exhibit P.3 (the draft agreement) which had provided for the forfeiture of the deposit in the event disclosed therein" speaks volumes of the lack of merits in this appeal. It was because the terms were unacceptable that the respondent refused to enter into the purchase. How could she possibly be bound by the terms of an agreement which she had refused to sign?

Indeed, a perusal of the said agreement shows that it was a trap for the unwary. It runs to 14 whole pages of type, contains 24 clauses and 3 schedules. Although clause 7 declared the price and amount of monthly instalments payable to be inclusive of interest, it was further provided in clause 9 as follows:—

"9. Notwithstanding the provisions relating to the rate of interest stipulated in Clause 7 above and specified in the Third Schedule hereto the vendor may from time to time by notice in writing of his intention so to do increase the aforesaid rate of interest."

Had the respondent objected to this clause alone — although, in my opinion many other objections could properly have been taken to the contract offered for her signature — she was plainly entitled to reject the contract.

In fact, when she paid the booking fee, neither she herself, nor Skyline too, for that matter, were aware of the precise terms of the contract which did not yet exist even in draft. Besides the price, the rate of instalments and interest — both of which could be increased and varied "at the discretion of the vendor" — none of the terms and conditions were made known to and accepted by the respondent. The condition (if it can be so called) expressed in the reservation form thus left the terms of the contemplated contract so nebulous and vague that no enforceable contract between the parties could have arisen thereby: see *Scammell* v. *Ouston*.[7]

This appeal accordingly must be dismissed with costs.

Appeal dismissed.

Solicitors: *Eugene Lye & Co.; Heng, Cheng & Co.*

ABDUL HAMID & ANOR. v. TAN CHU KIM

[O.C.J. (Choor Singh J.) July 4, 1969]
[Singapore — Suit No. 888 of 1968]

Damages — Domestic servant — Disablement due to injuries sustained — Employment by British Services personnel — Gradual full out of British Services — Future employment.

Damages — Leg 2½" Shortening — Osteoarthritis in right knee.

Damages — Hand — Compound fracture of right metacarpal bone and fracture dislocation of proximal interphalangeal joint of right ring finger.

In assessing damages for loss of future earnings of a domestic servant employed by a U.K. based civilian employee of the British Services in Singapore, the prospects of her regular employment after the complete withdrawal of the British Services from Singapore by the end of 1971, have to be taken into consideration.

CIVIL SUIT.

R. Ramason for the plaintiff.

Y.C. Chin for the defendant.

Cur. Adv. Vult.

Choor Singh J.: The second plaintiff in this suit is the wife of the first plaintiff and on the 8th August, 1967 at about 8 p.m. she was riding pillion on a motor-cycle ridden by her husband along Orange Grove Road, Singapore, when their motor-cycle was knocked down by a car driven by the defendant. Both plaintiffs sustained injuries and they now claim damages from the defendant in respect of those injuries.

The first plaintiff's version of the accident is as follows. He was travelling about three or four feet from left edge of the road at a